STATE OF MICHIGAN

COURT OF APPEALS

DALTON TOWNSHIP,

Plaintiff-Appellant,

v

TRIDONN CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 22, 2005

No. 262829
Muskegon Circuit Court
LC No. 03-042791-NZ

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties entered into a contract for the construction of a fire station for plaintiff. Plaintiff took occupancy of the station in late 1995. From the time of occupancy, the roof leaked in various places. Plaintiff lodged complaints with defendant, and defendant's employees undertook repairs to the roof on approximately eighteen occasions from 1996 through April 2002. In September 2003, plaintiff retained Fleis & VandenBrink Engineering, Inc. (F & V), to inspect the roof and determine the source of the problems. F & V informed plaintiff that the roof installed by defendant failed due to improper flashing, inadequate valley ice shields, missing or inadequate insulation over the attic duct work, and inadequate sealing in the valleys.

Plaintiff sued alleging that defendant breached its contract and committed gross negligence by failing to install proper flashing, adequate ice shields, adequate flashing and roof valleys, and adequate attic insulation. The complaint alleged that the causes of the damage were not discovered until the roof was inspected in 2003. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), alleging that plaintiff's cause of action was barred by the six-year statute of limitations in MCL 600.5839(1), and that the one-year discovery rule was inapplicable both because plaintiff discovered a possible cause of action more than one year before filing suit, and because its conduct did not constitute gross negligence. The trial court granted the motion, finding that the discovery clause in MCL 600.5839(1) did not preserve plaintiff's claim because the evidence showed that plaintiff knew of a possible cause of action no later than April 2002, the date of defendant's last repair work on the roof. The trial court did not address plaintiff's claim that defendant committed gross negligence.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

An action against a contractor for damages "arising out of the defective and unsafe condition of an improvement to real property" must be filed within six years "after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . . ." An action may be filed within one year after "the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the . . . damage . . . and is the result of gross negligence on the part of the contractor . . . ." MCL 600.5839(1).

Michigan has adopted the "possible cause of action" discovery rule. Once a plaintiff has knowledge of the existence of an injury and its possible cause, the plaintiff has knowledge of a cause of action, and the discovery period begins to run. *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994). The plaintiff need not know with certainty that a claim exists, or even know of the likely existence of a claim, in order for the discovery period to begin running. *Solowy v Oakwood Hosp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997).

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994).

The station roof constructed by defendant leaked in various places from the time plaintiff took occupancy of the station in late 1995. Defendant's attempts to repair the roof were unsuccessful, and eventually plaintiff retained both F & V to inspect the roof and assess the problem, and a roofing company to rebuild the roof. The trial court concluded that by April 2002, the date of defendant's last attempt to repair the roof, plaintiff was aware of a possible cause of action in that plaintiff knew that the roof leaked in various places and that defendant's numerous attempts to repair the roof had been unsuccessful. The trial court correctly applied the "possible cause of action" rule and concluded that the discovery period began to run in April 2002 at the latest. *Gephardt*, *supra*. Plaintiff's assertion that the discovery period did not begin to run until September 2003, when F & V inspected the roof and detailed the various causes of the leakage problem is without merit. Plaintiff was not required to know the reasons behind the leakage problem in order to know that it had a possible cause of action. *Solowy*, *supra*. The trial court correctly concluded that the one-year discovery rule in MCL 600.5839(1) was inapplicable, and that plaintiff's claim was time-barred.

The trial court did not address plaintiff's claim that defendant's conduct constituted gross negligence. Our review is limited to issues actually decided by the trial court. *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991). Nevertheless, plaintiff's allegations that defendant failed to properly install various parts of the roof and to make repairs constituted allegations of ordinary negligence at most. Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio